OSK Securities Bhd v Probo Pacific Leasing Pte Ltd & Anor

COURT OF APPEAL (PUTRAJAYA) — SUIT NO W-02–840 OF 2003
MOKHTAR SIDIN, ZALEHA ZAHARI AND HELILIAH JJCA
30 NOVEMBER 2008

Contract — Terms — Option clause — Two agreements with different periods for exercise of option — Whether agreement vitiated by fraud — Whether documents tampered with — Whether trial judge correct in finding of facts on terms of agreement

This was an appeal filed against the decision of the learned High Court judge who had dismissed the appellant's claim for declaratory relief against the first and second respondents and for damages against the second respondent. The main issue raised in the appeal related to a specific term in the agreement and the allegations that the defendants had either tampered with or forged the 1985 option agreement. There are two parallel documents identified as P1 and D15 respectively described by the parties as the put option agreement. P1 was the undated 1985 put option agreement while D15 was the dated 1985 put option agreement. The terms of both P1 and D15 are identical but there are certain particulars which are missing in P1 the undated 1985 put option agreement. P1 did not contain the date on which the agreement was purported to have been concluded. Ostensibly the 1985 option agreement which gave an option of three years was one where both parties had their attested signature and consideration was also stated. However the plaintiff in this appeal was claiming that agreement was vitated by fraud.

Held, dismissing the appeal with costs:

(1) (per **Zaleha Zahari JCA**) The reasoning of the trial judge in arriving at the findings and the conclusions were cogent and in accordance with the evidence before him. Having had the audio-visual advantage of having seen and heard the witnesses, considered the evidence and the probabilities of the case taken as a whole, as well as the documents presented, clearly entitled him to arrive at the conclusions he did. Hence, the trial judge was correct that the probabilities of the case points in favour of the put option agreement with a three-year option period and not three-day option period (see para 42).

(2) (per **Zaleha Zahari JCA**) The first respondent was entitled to be

compensated for the losses suffered because of the wrongful repudiation. The first respondent had in the circumstances of this case no choice but to accept the repudiation. The first respondent had acted reasonably and mitigated their losses by disposing of the said shares. In the circumstances, the first respondent was entitled to be compensated for the losses suffered (see para 43).

(3) (per **Heliliah JCA**) The respondent was not able to establish what were the representations that emanated from the first and the second respondents as well as conduct that constituted fraud or forgery other than suspicions that someone had somehow tampered with the documents (see para 70).

(4) (per **Heliliah JCA**) The conduct of the appellant had established acceptance of the agreement. Thus, it was difficult to dispute the finding of facts. The trial judge did not err in facts or law in arriving at his determination to warrant appellate intervention. Consequently, it was not necessary to dwell on the finding that the first respondent had succeeded in its counterclaim against the appellant (see para 71).

[Bahasa Malaysia summary

Ini adalah rayuan yang difailkan terhadap keputusan hakim Mahkamah Tinggi yang telah menolak tuntutan perayu untuk relief deklarasi terhadap responden pertama dan kedua dan untuk ganti rugi terhadap responden kedua. Isu utama yang dibangkitkan dalam rayuan berkaitan terma spesifik dalam perjanjian dan pengataan bahawa defendan-defendan telah sama ada mengubah atau memalsukan perjanjian opsyen 1985. Terdapat dua dokumen serupa yang dikenalpasti sebagai P1 dan D15 masing-masing digambarkan oleh pihak-pihak sebagai perjanjian 'put option'. P1 merupakan perjanjian 'put option' 1985 yang tidak bertarikh manakala D15 merupakan perjanjian 'put option' 1985 yang bertarikh. Terma-terma untuk kedua-dua P1 dan D15 adalah serupa tetapi terdapat butiran tertentu yang hilang dalam P1. P1 tidak mengandungi tarikh yang mana perjanjian tersebut dikatakan telah dimasuki. Kononnya perjanjian 'put option' 1985 yang memberikan pilihan tiga tahun merupakan suatu yang mana kedua-dua pihak telah mengaku saksi tandatangan mereka dan balasan juga telah dinyatakan. Walau bagaimanapun plaintif dalam rayuan ini mendakwa bahawa perjanjian tersebut tidak sah disebabkan oleh fraud.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Zaleha Zahari HMR**) Alasan hakim perbicaraan dalam membuat penemuan dan keputusan adalah meyakinkan dan menurut keterangan di hadapan beliau. Dengan kelebihan audio-visual untuk melihat dan

mendengar saksi-saksi, dengan mengambilkira keterangan dan kebarangkalian kes dilihat secara keseluruhan, dan juga dengan dokumen-dokumen yang telah dikemukakan, jelas melayakkan beliau untuk membuat keputusan yang dicapainya. Justeru itu, hakim perbicaraan adalah betul bahawa kebarangkalian kes berpihak kepada perjanjian 'put option' dengan tempoh pilihan tiga tahun dan bukan tempoh pilihan tiga hari (lihat perenggan 42).

(2) (oleh **Zaleha Zahari HMR**) Responden pertama berhak untuk diberi pampasan untuk kerugian yang dialaminya kerana penamatan secara salah. Responden pertama dalam keadaan kes ini tiada pilihan selain untuk menerima penamatan itu. Responden pertama telah bertindak secara munasabah dan mengurangkan kerugian mereka dengan menjual saham-saham tersebut. Dalam keadaan itu, responden pertama berhak diberi pampasan untuk kerugian yang dialami (lihat perenggan 43).

(3) (oleh **Heliliah HMR**) Responden tidak dapat membuktikan apakah representasi-representasi yang datang daripada responden-responden pertama dan kedua begitu juga perlakuan yang membentuk fraud atau pemalsuan selain rasa syak bahawa seseorang telah mengubah dokumen-dokumen itu (lihat perenggan 70).

(4) (oleh **Heliliah HMR**) Perlakuan perayu telah membuktikan penerimaan perjanjian itu. Oleh itu, adalah sukar untuk mempertikaikan penemuan fakta itu. Hakim perbicaraan tidak terkhilaf dari segi fakta atau undang-undang di dalam mencapai penentuannya bagi mewajarkan campur tangan mahkamah rayuan. Akibatnya, tidak perlu untuk memperkatakan tentang penemuan bahawa responden pertama telah berjaya dalam tuntutan balasnya terhadap perayu (lihat perenggan 71).]

Notes

For a case on option clause, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 5372.

Cases referred to

Bank Bumiputera Malaysia Bhd v Esah binti Abdul Ghani [1986] 1 MLJ 16, FC (folld)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1995] 2 MLJ 863, HC (refd)

Central Bank of India v Hartford Fire Insurance Co Ltd AIR 1965 SC 1288

Lam Soon Oil & Soap Manufacturing Ltd v Impex Syndicate Ltd [1964] 2 MLJ 176, PC (refd)

Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165, HC (folld)

Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87, HC (refd)

Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1926] AC 101 (refd)

A *Yeap Leong Huat v Yeap Leong Soon & Anor & another application* [1989] 3 MLJ 157, FC (refd)

Legislation referred to

Contracts Act 1950 ss 40, 76

B

N Navaratnam (Conrad Young with him) (Sivananthan) for the appellant.
M Nagarajah (Alvin Tang, Chryshantini Niles with him) (Shook Lin & Bok) for the first respondent
Robert Lazar (Rishwant Singh with him) (Shearn) for the second respondent.

C **Zaleha Zahari JCA:**

[1] This appeal is against the order of the High Court dated 25 August 2005 dismissing the plaintiff's (appellant in this appeal) claim against the
D defendants (respondents in this appeal) with costs.

[2] On 13 November 2007 the majority decision of this court was (Mokhtar Sidin JCA dissenting) to dismiss the appellant's appeal with costs
E and the deposit to the respondents to account of taxed costs. I have read the draft judgment of my learned sister, Heliliah Mohd Yusof JCA and agree with the judgment and would like to add the following as reasons why the appeal was dismissed.

F **[3]** The pleaded case of the appellant against the respondents was that prior to 9 November 1985 the second respondent had approached one of their directors, Steven Wong Chong Che (Wong), requesting the appellant to enter into a put option agreement with the first respondent whereby the first respondent shall have the option of selling up to 1,500,000 of the shares in
G Allied Malayan Development Bhd (now known as Pan Global Equities Bhd) (hereinafter referred to as 'the said shares') to the appellant at the purchase price of S$2.20 per share on the day the option is exercised. The appellant's case was that according to the representations made to them by Wong, the period within which the first respondent was entitled to exercise the option
H to sell the said shares to the appellant was three days from the date of execution of the agreement.

[4] When the put option agreement was presented to the appellant's director for execution, according to the appellant, the option period specified
I in the agreement which the appellant signed was three days from the date of execution of the agreement. The appellant's case was that when they signed the agreement, the agreement was then incomplete as it had not been executed by the first respondent. The appellant denied receiving a copy of a completed put option agreement.

[5] On 26 October 1988 the appellant received a notice from the first respondent of their intention to sell the said shares to them pursuant to a put option agreement dated 9 November 1985. Upon receipt of this notice the appellant requested for a copy of the put option agreement, and upon a copy being furnished with it, discovered that the option period was three years and not three days. The appellant denied having executed a put option agreement providing for a three year option period. The appellant's case was that they would not have executed the put option agreement had the option period been for a three year period.

[6] On 2 November 1988 the appellant gave the first respondent notice that they were not bound by the put option agreement dated 9 November 1985. They considered the put option agreement to be a forgery, and accordingly, null and void. On 10 January 1999 the appellant commenced proceedings at the Kuala Lumpur High Court for a declaration that the put option agreement dated 9 December 1985 was a forgery and void ab initio. The appellant also claimed damages as against the second respondent should the court rule that the put option period is for three years.

[7] According to the defence and counterclaim filed by the first respondent, the put option agreement dated 9 November 1985 between the first respondent and the appellant was valid and enforceable, by which agreement the first respondent had the option of selling up to 1,500,000 of the said shares to the appellant within three years from then date of the agreement at a price of S$2.20 per share on the day the option is exercised by delivery of notice in cl 3.

[8] The first respondent also pleaded that the second respondent had never acted on behalf of the first respondent; alternatively, they had no knowledge of the alleged representations made by the second respondent to the appellant. No liability could therefore be attached to the first respondent for the acts of the second respondent.

[9] The first respondent case was that a copy of the executed put option agreement had been extended to the appellant and the appellant had duly acknowledged receipt of the same. This was verified by the conduct of the appellant by clearing the first respondent's cheque of S$1 paid as consideration for the said agreement. The appellant is accordingly estopped from denying that they had entered into the put option agreement with a three year option period.

[10] The first respondent then claimed that the appellant had wrongfully repudiated the said agreement, which repudiation the first respondent accepted. By reason of the appellant's wrongful repudiation the first

respondent was compelled to sell the said shares at prices less that the price of S$2.20 per share provided in the put option agreement. Taking into account the amount received from the sale of the said shares amounting to S$1,432,211.20, the first respondent claimed to have suffered a loss of S$1,867,788.80 and applied for judgment to be entered against the appellant in this amount, together with interests and costs.

[11] The second respondent defence to the appellant's claim was this. Sometime prior to 9 November 1985 the second respondent enquired from Wong whether the appellant would be prepared to enter into a put option agreement with the first respondent in respect of 1,500,000 shares in Allied Malayan Development Bhd at a price of S$2.20 per share on the day of its exercise, which was to be exercised within a period of three years. The appellant, through Wong, agreed to enter into such an arrangement. Thereafter, the second respondent informed the first respondent of the same. The required documents were then prepared by the first respondent's solicitors.

[12] Upon receipt of the documents from the first respondent, the second respondent brought them to the appellant's office and left them with Wong. After the put option agreement had been signed by Wong on behalf of the appellant, witnessed by the appellant's office manager, Kok Khuen Lin, and the appellant's company stamp affixed, the second respondent collected the same and dispatched them to the first respondent.

[13] The second respondent denied that the put option agreement which he left with Wong, provided for an option period of three days, but that it was for a period of three years. That at all times the appellant was aware that the option period for the exercise of the option was three years as expressly stipulated in the agreement. The second respondent denied each and every particulars of fraud pleaded as against him.

THE HIGH COURT JUDGE'S FINDINGS

[14] Based on the evidence presented, the High Court judge by order dated 2 September 2003 dismissed the appellant's claim. He then allowed the first respondent's counterclaim in the sum of S$1,867,788.80 with interest at the rate of 8%pa from the date of filing of the re-amended defence and counterclaim, (viz, 4 June 1998) to date of full payment and settlement and costs. The reasoning of the learned judge in arriving at the findings and conclusions which he did are as follows.

[15] The judge approach to the case was that he had to decide between two rival versions as a matter of construction, whether the option period in the

put option agreement in favour of the first respondent to purchase the said shares was for a period of three days or three years? A

[16] He considered the probabilities of the case and then ruled that the evidence adduced by the appellant was insufficient to prove that the executed put option agreement had been forged or been tampered with. His analysis of the evidence was that the appellant's allegation that the option period of three days was inconsistent with cll 1.2 and 2.1 of the put option agreement. Had the period been for three days as claimed by the appellant, the option period would have expired before execution and stamping could take place. B C

[17] He rejected the appellant's allegation that they were induced to enter into the put option agreement from representation made by the second respondent.

[18] He also tested the rival contentions against the contemporaneous documents. The judge was of the view that an option period of three years was more consistent with contemporaneous document which had been executed. As for the conduct of the appellant, this also did not assist them. The judge then made a finding of fact that the appellant's contention of parties having intended an option period of three days was not credible. He also made a finding of fact that there was no evidence that the first and second respondents had committed fraud. D E

THE APPELLANT'S SUBMISSION F

[19] The appellant's council submitted that the trial judge had asked himself the wrong question, failed to have regard to relevant considerations, took into consideration irrelevant considerations. That there was insufficient judicial appreciation of the evidence warranting appellate interference. According to him no reasonable court properly directing itself and asking the correct question would have arrived at the conclusions which the trial judge did. G

[20] The appellant's counsel was of the view that the trial judge had asked himself the wrong question. The issue which the judge should have addressed was, 'whether or not the put option had been forged?' Not that as posed by him, to choose between the evidence of the appellant and the first respondent, and treating the case as a dispute over the construction of documents rather than a case of forgery. As two conflicting put option agreement had been produced, one must have forged. H I

[21] He submitted that the judge erred in stating that the appellant had made bare allegations of fraud and this led him to make further erroneous

findings that there was no evidence of fraud against the first respondent. According to him, the learned judge did not consider the explanation that fits all the facts, ie the probability of the second respondent switching the front page of the put option agreement by one in which the option period was three days and not three years. After procuring the appellant's signature, to switch the front page back again, where the option period was three years, before returning it to the first respondent. According to the appellant's counsel this version was inconsistent with the loan agreement and other security documents.

[22] The judge misdirected himself by ignoring the fact that the evidence for both sides was consistent with the put option agreement having been forged by the second respondent. The second respondent was the only point of contact between the appellant and the first respondent and had both, motive and opportunity, to perpetrate the forgery. The judge's considered the evidence only from the angle that both respondents had a common interest in forging the put option agreement and closed his mind to the possibility of the second respondent acting alone.

[23] According to the appellant's counsel the following factors indicate the culpability of the second respondent. The put option was to serve as security for the loan from the first respondent. The second respondent had initially intended to obtain it from Kimara Securities, but was unable to secure it. The loan would not have been disbursed unless a stock broker to substitute Kimara Securities was found. The second respondent has since entered into an arrangement with the first respondent which placed all liability on the appellant so that he could recover what he had paid under the guarantee. The first respondent failed to exercise any of the other put option agreements which had been executed. The second respondent funding the defence and counterclaim of the first respondent.

[24] The judge was confused on the applicable standard of proof. The judgment was based on the 'beyond reasonable doubt approach'. He submitted that the appellant need not show that the first respondent was involved in the fraud (forgery). The put option is void if it was procured by the fraud of another, even if the first respondent was not involved in it.

[25] The judge failed to take into account the police report lodged by the appellant in 1991 (P8). The judge placed great reliance on the lateness in lodging the report even though PW1 explained that he did not report it sooner because he was not aware he should, and did so later upon being advised to do so by his lawyers.

[26] The judge made inferences from the contemporaneous documents,

the loan documents and other security documents that they were more consistent with a three year option than a three day option. The appellant counsel submitted that the judge erred in doing so as these documents were not within the knowledge of the appellant at the time the option was signed.

[27] As to the quantum of damages, the High Court judge failed to give credit for a judgment that had earlier been entered in Singapore against the borrower and guarantors, and the respondents failure to mitigate. The counter claim was brought for the benefit of the guarantors who had already paid the whole judgment amount save for approximately S$300,000. No proof was given of the actual amount then outstanding on the loan. The appeal should be allowed for failure to prove damages.

THE FIRST RESPONDENT COUNSEL'S SUBMISSION

[28] He submitted that where an appeal turns upon pure question of facts based on the credibility of witnesses, the function of determining where the truth lies on a balance of probabilities is entrusted to the trial court. He submitted that the judgment under appeal does not contain any error warranting appellate interference.

[29] Based on the evidence before the court the judge was right in finding that the put option agreement dated 9 November 1985 was valid and enforceable for a period of three years and not three days. DW1 who prepared the put option agreement testified that in the put option agreement which he prepared the option period was for three years. This agreement bears Wong's signature on behalf of the appellant, witnessed by Kok Khuen Lin (PW2) and upon which the appellant's company stamp was affixed. The first respondent's cheque of S$1 and the executed put option agreement dated 9 November 1985, under cover of letter dated 27 November 1985, was delivered to the appellant via courier on 30 November 1985. The appellant duly acknowledged receipt of the same. The first respondent's cheque of S$1 had been presented for payment and cleared on 24 December 1985.

[30] The appellant only disputed the three year put option period in the put option agreement dated 9 November 1985 after the first respondent sought to exercise their option to sell the said shares on 26 October 1988, nearly three years later. Prior to this, the appellant gave no indication that they did not receive the executed put option agreement, or that the put option period was for three days, which period would have expired by the time the put option agreement was delivered to the appellant vide letter dated 27 November 1985. He submitted that in these circumstances the appellant is estopped from denying the existence of the put option agreement dated

A 9 November 1985 as well as its contents, including the three year period, as well to vary the terms contained therein.

[31] The judge was right in finding that the appellant's assertion of a three day option period was inconsistent with contemporaneous documents, as well as in view of cll 1.2 and 2.1 of the put option agreement. These clauses envisage terms suited to a longer option period, and not for three days, which period would have expired even before the execution and stamping could take place.

[32] The contemporaneous documents and correspondence supports an option period of three years, ie the loan facility agreement dated 9 November 1985, entered into between the first respondent and Hove Traders Pte Ltd where the loan facility of S$3m was made available for a period of two years from the date of the first drawdown (ie 9 December 1985, exh D16). The guarantee agreement dated 9 November 1985 between the second respondent and Tan Kim Yeow, and the first respondent, (exh D17). Three other put option agreements all dated 9 November 1985 between the first respondent and the second respondent, Global Holdings Sdn Bhd, and Tan Kim Yeow respectively which provides that the first respondent is given the option of selling up to 1,500,000 of the said shares at the price of S$2.20 per share, where the option period was for three years from the date of the agreement, (exhs D18, D20 and D21).

[33] The appellant's assertion of a put option period of three days is not credible in view of the loan agreement being for a two year period. The first respondent had at trial through DW1 and Thomas Enslow (DW2) proved that the put option period would be for a longer period than the loan agreement. If a borrower were to default in repayment, the first respondent would be able to enforce part of the security in the form of the put option agreement. If the put option agreement ended on the same period or before the expiry of the loan agreement, then the first respondent would run the risk of not being able to exercise its rights under the put option agreement.

[34] The appellant had accordingly failed to discharge the burden of proof on a balance of probabilities based on the particulars of fraud pleaded. The burden was on the appellant to show that the first and second respondents had fraudulently tampered the put option agreement. These bare allegations of fraud were unsupported by any evidence at trial, and rightly dismissed by the High Court judge.

[35] Also material is the fact that the second respondent was not the agent of the first respondent, nor was he authorised to represent the first respondent in negotiations vis-à-vis the put option agreement. Any knowledge of any

representation made by the second respondent alleged by the appellant cannot be attributed to knowledge of the first respondent. The first respondent cannot in this circumstance be said to have fraudulently induced the appellant to enter into the put option agreement, as the first respondent had not made any representations nor come into contact with the appellant. The judge was accordingly right in ruling that the appellant had failed to discharge the burden of proving that the first respondent had forged and/or tampered with the put option agreement.

[36] It is common ground that when the appellant refused to fulfill their obligations under the put option agreement, the first respondent accepted the appellant's repudiation and made it known to the appellant of their intention to claim damages. Due to the wrongful repudiation, the first respondent was compelled to sell the said shares at a price less than the agreed price of S$2.20 per share in order to recoup their losses. The said shares were finally sold for a total sale price of S$1,432,211.20 (exhs D31 and D30). The first respondent is claiming for the loss of the benefit of the put option agreement and the loss of revenue of S$1,867,788.80 in their counter claim pursuant to ss 40 and 76 of the Contracts Act 1950. The High Court judge ruling on this issue was that the first respondent had no choice but to accept the appellant's repudiation, that they had mitigated their losses by disposing of the said shares and is entitled to be compensated for the losses suffered.

[37] The first respondent's counsel submitted that any claim which the first respondent may have against Hove Traders, Tan Kim Yeow, Tan Kim Wah and Global Holdings Sdn Bhd, is of no relevance. The issue in this appeal is whether the put option agreement is valid and binding on the appellant. If it is, the first respondent is entitled to claim for losses suffered as a result of the wrongful repudiation irrespective of any claim it may have against other third parties. The case *Bank Bumiputera Malaysia Bhd v Esah binti Abdul Ghani* [1986] 1 MLJ 16 the Supreme Court was cited as authority for this proposition.

THE SECOND RESPONDENT'S SUBMISSION

[38] The second respondent's counsel also submitted that the judgment does not contain error warranting appellate interference. The appellant admits entering into a binding obligation with the first respondent of a 'put option' in favour of the first respondent. The dispute is over the terms of the option, whether it was for three days as contended by the appellant, or three years as contended by the respondents. The judge was right in approaching the issue which he was required to decide, amidst the allegations of forgery, tampering of document and fraudulent misrepresentation.

A **[39]** It is common ground that it was the second respondent who approached their director Wong. The time period between the first approach and the execution of the put option agreement was about two months. PW1 met with the second respondent once or twice over this matter. The document was with PW1 for two or three days. PW1 was not pressurised or B hurried into signing the put option agreement. The document prepared was for a three year period which document was signed by PW1 in terms of exh 'D15'.

C **[40]** It is not correct to say that the evidence points to the second respondent acting alone and the trial judge had closed his mind to this. The judge did consider the alleged culpability of the second respondent and ruled hat he did not commit the misdeed alleged.

D DECISION

[41] Did the judge pose himself a wrong question? My view on this issue is this. In view of the admission by the appellant of having entered into a binding obligation with the first respondent of a 'put option' in respect of the E said shares in favour of the first respondent, I am of the view the judge was correct in posing the question which he was required to determine, whether there was a valid put option agreement for three days as contended by the appellant or three years as contended by the respondents.

F **[42]** To warrant appellate interference it was incumbent upon the appellant have to demonstrate that the High Court was 'plainly wrong'. This appeal turns upon question of facts based on the credibility of the witnesses. After careful consideration of the reasoning of the trial judge in arriving at his G findings and conclusion, it is clear that he had taken into consideration all relevant matters and did not take into account irrelevant ones. The reasoning of the trial judge in arriving at the findings and the conclusions were cogent and in accord with the evidence before him. Having had the audio-visual advantage of having seen and heard the witnesses, considered the evidence H and the probabilities of the case taken as a whole, as well as the documents presented, clearly entitled him to arrive at the conclusions he did. I am in agreement with reasoning and conclusion that the probabilities of the case points in favour of a three year option period, and not a three day option period.

I **[43]** The first respondent is clearly entitled to be compensated for the losses suffered as a result of the wrongful repudiation. The first respondent had in the circumstances of this case no choice but to accept the repudiation. The first respondent had acted reasonably and mitigated their losses by disposing

off the said shares. The High Court judge was right in finding that the first respondent is entitled to be compensated for the losses suffered in the amount claimed in the counterclaim.

[44] On my part, the High Court judge's decision is affirmed. The appeal is dismissed with costs. The deposit to the respondents to account of taxed costs.

Heliliah JCA:

[45] This was an appeal that was filed against the decision of the learned High Court judge who had dismissed the appellant's claim for declaratory relief against the first and second respondents and for damages against the second respondent. In addition the first respondent's counterclaim against the appellant for the sum of S$1,867,788.80 has been allowed with interest at the rate of 8%pa from the date of filing of the re-amended defence and counterclaim that is 4 June 1998 to the date of full payment and settlement of costs. Hereafter in this appeal the appellant and the two respondents would also be referred as the plaintiff and the first and second defendant respectively.

[46] The plaintiff has prayed for the following orders:

(a) a declaration that a put option agreement over shares dated 9 November 1985 entered into between the plaintiff and the first defendant, a company incorporated in Singapore, is a forgery and therefore void ab initio;

(b) for damages against the second defendant, a director of Hove Traders Pte Ltd, a company incorporated in Singapore and Global Holdings Sdn Bhd, a locally incorporated company, in the event that the court finds that the put option agreement was for a period of three (3) years.

[47] The first defendant has also filed a counterclaim for wrongful repudiation of the afore mentioned agreement dated 9 November 1985 ('1985 option agreement').

[48] Before dealing with the issues addressed in the appeal the relevant facts leading to the appeal require mention. The 1985 option agreement was then prepared by DW1 of M/S Prakash Gurbani & Chong then the first defendant's solicitors. The documents were then sent to the second defendant's office, who then left the documents at the plaintiff's office with one Steven Wong Cheng Che a director of the appellant. Upon execution of the documents by the plaintiff the documents were collected and dispatched to the first defendant. On 30 November 1985 the 1985 option agreement, a

covering letter dated 27 November 1985 and a cheque payment of S$1 were delivered by courier to the plaintiff. The executed agreement was acknowledged receipt by the plaintiff where the letter of 27 November 1985 was not disputed by the plaintiff. Additionally the first defendant's cheque of S$1 paid as consideration was also cleared by the plaintiff. Subsequently on 21 October 1988 the first defendant gave written notice to the plaintiff that it considering exercising its rights under the 1985 option agreement. The plaintiff at that juncture requested from the first defendant a copy of the agreement and on 26 October 1988 a copy of the said agreement was faxed to the appellant. On that same date, that is, 26 October 1988 the first defendant gave its written notice to the plaintiff that it was exercising its option to sell the shares to the appellant under the terms of the 1985 option agreement. This was denied and it was subsequent to this by a letter of 3 December 1989 that the plaintiff through its solicitor stated that the 1985 option agreement being relied upon has 'been falsified and/or forged'. This led to the plaintiff filing its claim. The following are the relevant excerpts from the amended statement of claim.

11. Further, it is averred that the second defendant's representations was made fraudulently, in that the second defendant knew that it was false, or made recklessly, not caring whether it was true or false.

12. By reason of the second defendant's fraudulent misrepresentations, the Plaintiff will suffer loss and damage in the event that the honourable court finds that the put option period is for a period of three [3] years.

13. *The 1st Defendant and/or the 2nd Defendant and/or a servant or agent of the 1st or 2nd Defendant intentionally or fraudulently tampered with the said incompleted agreement.*

PARTICULARS OF FRAUD OF THE 1ST DEFENDANT AND/OR THE 2ND DEFENDANT AND/OR A SERVANT OR AGENT OF THE 1ST DEFENDANT OR THE 2ND DEFENDANT

a. *Intentionally of Fraudulently removing or causing to be removed the first page of the said incompleted Agreement which had the word '... three (3) days...' on the 3rd line of recital B of the said incompleted Agreement, after the Plaintiff had executed the said incompleted Agreement and without the Plaintiff's knowledge, consent and/or authority.*

b. *Intentionally of Fraudulently replacing or causing to be replaced the first page of the said incompleted Agreement with another page which had the word 'three (3) years' instead of 'three (3) days' on it, after the Plaintiff had executed the said incompleted Agreement and without the Plaintiff's knowledge, consent and/or authority.*

c. *Intentionally or Fraudulently altering and/or amending the word three*

(3) days in the said incompleted Agreement to three (3) years, after the Plaintiff had executed the said incompleted Agreement and without the Plaintiff's knowledge, consent and/or authority.

d. *Intentionally or Fraudulently tampering with the said incompleted Agreement which had already been executed by the Plaintiff without the Plaintiff's knowledge, consent and/or authority.*

[49] The main issue raised in the appeal relates to a specific term in the agreement and the allegations that the defendants had either tampered with or forged the 1985 option agreement. There are two parallel documents identified as P1 and D15 respectively described by the parties as the put option agreement.

[50] P1 is the undated 1985 put option agreement while D15 is the dated 1985 put option agreement. The terms of both P1 and D15 are identical but there are certain particulars which are missing in P1 the undated 1985 put option agreement. P1 does not contain the date on which the agreement is purported to have been concluded. Additionally P1 does not contain the signature of PROBO PACIFIC LEASING PTE LTD referred as a 'PPL' or the first defendant in this appeal. P1 contains the signature of Wong Chong Che made for and on behalf of OSK & PARTNERS SDN BHD referred to as the 'intending purchaser' or the plaintiff in this appeal.

[51] Apposite to P1, D15 indicates that on 9 November 1985 an agreement was made between PPL and the intending purchaser. D15 also contained the signatures of both parties and a stamp.

It is this agreement which is the source of dispute between the parties as stated by the learned trial judge in the grounds of judgment as follows:

> The main issue in these proceedings which needed to be determined by the court was whether the option period was 3 days as insisted by the plaintiff or 3 years as contended by the first and second defendants. The other issues which needed to be determined was whether the executed put option agreement was a forgery and whether the defendants had committed fraud.

[52] Ostensibly the 1985 option agreement which gave an option of three years was one where both parties had their attested signature and consideration was also stated. However the plaintiff in this appeal is claiming that agreement is vitated by fraud.

[53] At the outset it is noted that the learned trial judge in his grounds of judgment has displayed that he has considered the opposing evidence before arriving at a determination that on a balance of probabilities the plaintiff has

not succeeded in establishing that the first page of the document D15 has been tampered and that the original copy of the agreement is as found in document P1.

[54] The plaintiff has alleged misrepresentation in addition to fraud. The learned trial judge in making a finding has in our view perused in detail the evidence adduced both by the plaintiff and the defendants. Throughout the written grounds of judgment it is noted that the learned trial judge had sieved through the evidence led by the witnesses for the plaintiff and the defendants. It has been elaborated in the grounds of judgment that the burden was therefore on the plaintiff to show that what has been executed was a put option agreement for three days and that both the first and second defendants had tampered either intentionally or fraudulently with the incomplete put option agreement or fraudulently altered or amended the first page of the agreement to show that the put option period was for three years or by replacing the first page of the agreement with a new page whereby the option period became three years.

[55] The 1985 option agreement was the outcome of discussions between PW1 a witness for the plaintiff and the second defendant (DW3) a client of the plaintiff. The oral evidence of PW1 and PW3 were to the effect that what had been negotiated was a three day put option. Nevertheless the very document relied upon by the plaintiff appeared to be one sided in that there was an undated document with no completed signatures for both parties. The evidence of the plaintiff did not furnish an explanation as to why the document was not signed by both parties. It was the contention of the plaintiff that as the result of representation made by the second defendant the put option agreement was intended to be an instrument to enable the second defendant's company to secure a credit facility from the first defendant. PW1 who had signed the agreement maintained that the photocopy of the put option agreement which was undated represented copies of the put option agreement which were returned to the second defendant.

[56] It is found that the learned trial judge has accepted the evidence of the defence witnesses in refusing the oral evidence of the plaintiff witnesses PW1 and PW3 that in the negotiations conducted between PW1 and DW3 it was the latter who had represented to PW1 that the option period would be for three days because it was merely intended for purposes of bridging the second defendant's financial obligations. It was the second defendant who approached PW1 to request the plaintiff whereby the said agreement was discussed between the second defendant and PW1. It was the averment of the plaintiff that a put option of three years did not commensurate with the granting of a fee of RM15,000 as a put option for a period of three years would have been structured differently in the form of a six month rollover

account. The circumstances of the case indicate that there was required by the second defendant financing in the form of loans transactions to which it was there was a condition that the second defendant should obtain a put option from a reputable broker in favor of the first defendant. The 1985 option agreement constituted a security for the loan granted by the first defendant to the second defendant. According to the plaintiff the 1985 option agreement was the outcome of the second defendant being able to convince PW1 that he only required a put option period of three days to bridge his financing. But the allegation against the second defendant was that after having received the signed agreement he was the person who caused the first page to be altered that is the second defendant has forged/and or tampered with the agreement for his own benefit. *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1995] 2 MLJ 863.

[57] The first defendant however relied on the contemporaneous documents that led to the existence or the need of having a put option agreement which in all circumstances would be more consistent with a three year period of option. There was here a form of tripartite arrangement whereby the first defendant is a company incorporated and carrying on business in Singapore. The second defendant a Malaysian businessman and valued client of the plaintiff had at the material time engaged in share transactions via the plaintiff company. Being the director of Hove Traders Pte Ltd and Global Holdings Sdn Bhd. Hove had applied for a loan of S$3m from the first defendant for a term of two years. It is the defendant's case that the disputed put option was not drafted in isolation. The put option constituted one of a series of transactions supporting the loan facility between Hove and the first defendant. The defendants relied on the circumstances prior to and at the time of the execution of the put option. The defendant's witness DW1 is the solicitor who prepared the agreement and who maintained that it was for a period of three years. There were three other put option agreements concluded between the first defendant and the second defendant, the first defendant and Global and between first defendant and Tan Kim Yeow. In all three the option period was also for three years. The defendant therefore relied on judicial statements made in *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165 namely that:

> It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously all the documents must be read together as if they are one.

[58] All those documents were prepared by one firm that of DW1.

[59] Estoppel was also relied as a defence by the first defendant in that the conduct of the plaintiff was such that there had not been an outright

manifestation that the period of the put option was not three years. Even the police report which was lodged was made to support alleged fraud was made after the filing of the action. Evidence was also given that the plaintiff did receive and had banked an amount of S$1 (the consideration for the 1985 option agreement). The plaintiff had also been paid RM15,000 by the second defendant as a fee for signing the 1985 option agreement.

[60] The plaintiff professed to have been made aware of the difference in period only when it received a letter dated 21 October 1988 when the first defendant declared its intention to exercise their rights under the put option.

[61] It is part of the contention of the plaintiff that the changes in the duration of the put option period is evidenced by perforation marks which suggest that the documents have been stapled and restapled. The allegation of fraud and/or forgery according to the plaintiff points towards the second defendant. In respect of this allegation the learned trial judge has accepted the law as applied in *Waimiha Sawmilling Co Ltd V Waione Timber Co Ltd* [1926] AC 101 in the proposition that fraud means actual fraud and not constructive or equitable fraud. The allegations of representation and forgery were clearly not accepted by the learned judge.

[62] On the contrary favorable acceptance was made of the submission that overall terms of the agreement were in consonance with a three year put option period cll 1.2, 2.1 of exh D15.

[63] It would also appear that the evidence of DW1 indicated that the handling of the documents were all prepared by the firm of Prakash Gurbani & Chong. Against the background of contemporaneous documents it was also determined that the conduct of the plaintiff in the acceptance and encashment of cheques constitute estoppel by conduct.

[64] In view of two sets of evidence adduced by the litigant it becomes incumbent upon this court to deal with specific parts of the judgment of the trial court in making certain findings firstly on the allegations of misrepresentation and secondly on the issue of fraud.

[65] After having perused cll 1.2 and 21 the learned trial judge stated:

> I would agree with the contention of counsel for the first defendant that the above-said clauses envisaged terms suited to a longer option period and were therefore inconsistent with the plaintiff's claim that the option period was for three days from the date of the execution of the put option agreement. If the put option agreement was indeed for three days, as averred by the plaintiff, the option period would have expired even before the execution and stamping of the put option agreement could take place. Under the circumstances, the claim by the plaintiff

that they were induced into entering the put option agreement as a result of the representation made by the second defendant, namely, that the option period would be three days from the date of the execution of the agreement, cannot stand. A representation is a statement of fact. The second defendant denied having ever made such a representation to the plaintiff. According to *Chesire, Fifoot and Furmston's Law of Contract*, Singapore and Malaysian Edition (at p 407) a representation is:

> ... a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract.

The plaintiff insisted that the second defendant did made a representation that the option period was for three days. I had the advantage of observing the second defendant when he gave evidence from the witness-box but then I am also aware that it is always unsafe to rely on the demeanour of a witness who is also a defendant in cases of this nature where there is an abundance of contemporaneous documentary evidence. I would tend to agree with the submission of counsel for the first defendant and also that of the second defendant that the testimony of the second defendant should be tested against the documentary evidence, particularly documents that are contemporaneous with the transaction.

[66] Further on the following finding was made:

I would also agree with the contention of counsel for the first defendant that they had raised sufficient evidence at the trial through DW1 and the managing director of the first defendant (DW2) to prove that the option period would naturally have been for a longer period than the loan agreement. If a borrower defaulted in repayment in case of expiry of the loan, the first defendant would have the put option agreement as part of an overall security for such a loan and if need be, the first defendant will be able to enforce the security. If the put option agreement ended on the same period or before the loan agreement, the first defendant would be at risk of not being able to exercise their right under the put option agreement. Therefore the plaintiff's allegation that the parties intended and had entered into an agreement for a period of three days appears to be far from credible when the loan agreement was in fact for a two year period. In agreeing with the above submissions of the first and second defendants, I had in the forefront of my mind the general principles of construing a contract. In *The Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995, Lim Beng Choon J said (at pp 997 – 998):

> In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p 560:
>
> > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the

> four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

In *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p 1290:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[67] With regard to the allegation of fraud the following observation was made:

> The other charge against the first and second defendants was that they have committed fraud. Fraud simply means dishonesty and the law is that a charge of fraud, whether made in civil or criminal proceedings, must be proved beyond reasonable doubt and cannot be based on conjecture (*Narayanan v Official Assignee, Rangoon* AIR 1941 PC 93). In *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 Raja Azlan Shah CJ (Malaya) (as he then was) said (at p 138):
>
> > Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie, dishonesty of some sort' for which the registered proprietor is a party of privy. 'Fraud is the same in all courts, but such expressions as 'constructive fraud' are ... inaccurate;' but 'fraud ... implies a willful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled. (per Romily MR in *Green v Nixon*). Thus in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ...'.

On the facts of the case, I cannot see any evidence which could show that the first and second defendants had committed fraud. I would agree with the submissions of both counsel for the first and second defendant the plaintiff had only made bare allegations of fraud, unsupported by any evidence given at the trial. In his submission, counsel for the first defendant argued that there was not a shred of evidence to prove the existence of fraud and that the first defendant was privy to any such fraud. He contended that despite raising the issue of fraud, the plaintiff had failed to discharge the burden of proof on a balance of probabilities on that

plea based on the particulars of fraud pleaded and evidence given at the trial. Thus the charge by the plaintiff that the first defendant had made fraudulent representations to the plaintiff cannot stand at all. This, he pointed out, was supported by a letter dated 5 September 1989 (exh P9) wherein the plaintiff, by their solicitors, had admitted that the 'Prior to the 28th October 1988 the plaintiff was not aware of the existence of the first defendant nor have they had any correspondence, dealings or any communication whatsoever with the first defendant'. That letter further stated the following:

> there is an error to paragraph 6 of the Statement of Claim. The representations were made by the 2nd defendant and not by the 1st defendant as stated.

Counsel stressed that the plaintiff had not specifically denied the first defendant's averment in para 5 of their statement of defence which clearly set out that the second defendant was never at any time acting on behalf of the first defendant. The first defendant had led evidence at the trial to prove that the second defendant was neither an agent of the first defendant nor was he authorised to represent the first defendant to negotiate on behalf of the first defendant as regards the put option agreement. The second defendant made the arrangements for the plaintiff to enter into the put option agreement with the first defendant in order to obtain financing, and in return, it was the second defendant who subsequent to negotiations paid the RM15,000/- to the plaintiff as fee for signing the put option agreement. Therefore, knowledge of any representation made by the second defendant as alleged by the plaintiff cannot be attributed to the first defendant. The first defendant cannot be said to have fraudulently induced the plaintiff to enter into the put option agreement as the first defendant had in fact neither made any representations nor come into contact at all with the plaintiff at that material time.

On the whole, I would agree with the submission of both counsel for the defendants that the plaintiff had failed to prove forgery and/or fraud against the first and second defendants even on a balance of probabilities. What is clear, to me, is that there is nothing to show that the first defendant was guilty of any wrongdoing of any nature with regard to the put option agreement. The plaintiff's allegations against the first defendant are without basis. Since the plaintiff had failed to establish the charge of forgery and/or fraud against the second defendant, the executed put option agreement stands and consequently the first defendant would be entitled to exercise their right under the same.

[68] In *Yeap Leong Huat v Yeap Leong Soon & Anor & Anor application* [1989] 3 MLJ 157 the Federal Court has stated, inter alia, that an appellate court can review a trial court's decision if the reasons are unsatisfactory or if in reaching its conclusion the learned judge has not properly analysed the entirely of the evidence which was given before him. The question here also is whether there has been failure to give due regard to some evidence. The response here is found in the case of *Lam Soon Oil & Soap Manufacturing Ltd v Impex Syndicate Ltd* [1964] 2 MLJ 176 where Wee Chong Jin CJ referred to a Privy Council decision on a statement of the principles upon which an

appellate court should act in reviewing the decision of a judge of first instance in *Tay Kheng Hong v Heap Eng Moh Steamship Co Ltd* [1964] MLJ 87 where it is said:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas v Thomas*: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd*: 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment'. Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.

[69] This is indeed a case where it cannot be said that the learned trial judge has omitted to consider aspects of the evidence led by the plaintiff or the first and second defendants.

[70] In its totality counsel for the first defendant has submitted that the appellant's case is such there is no room for us not to defer to the judgment of the trial judge. We find it difficult not to uphold this contention. The plaintiff has not been able to establish what were the representations that have emanated from either the first and second defendants as well as conduct that constitutes fraud or forgery other than suspicions that someone has somehow tampered with the documents.

[71] In finding that the conduct of the plaintiff had established acceptance

of D15 we found it difficult to dispute the finding of facts. We do not find here that the trial judge has erred in facts or law in arriving at his determination and henceforth to warrant appellate intervention. Consequently we do also not find it necessary to dwell on the finding that the first defendant has succeeded in its counterclaim against the plaintiff. Accordingly by a majority decision the appeal is dismissed with costs. The decision of the High Court is affirmed. Deposit is for the defendants towards account of taxed costs.

Appeal dismissed with costs.

Reported by Mashrifah Ravendran